

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:13-CR-74-2BR
No. 7:14-CV-202-BR

JORGE ERNESTO TINOCO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER

This matter is before the court on the 8 September 2016 memorandum and recommendation (“M&R”) of U.S. Magistrate Judge James E. Gates. (DE # 131.) Judge Gates recommends that Grounds 1 and 2 of petitioner’s 28 U.S.C. § 2255 motion, which allege ineffective assistance of counsel, (DE # 90), be dismissed.¹ Petitioner filed objections to the M&R, (DE # 134), to which the government filed a response, (DE # 135).

This court is required to “make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); see also R. Gov. 2255 Proceed. 8(b). The court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Giving appropriate deference to Judge Gates’s credibility findings, see United States v. Davis, 939 F. Supp. 2d 535, 539 (E.D.N.C. 2013) (“While a ‘*de novo*’ determination is not necessarily the same as a *de novo* hearing . . . even as to those findings based on the magistrate’s judgment as to the credibility of the witnesses before him,’ ‘it is unlikely that a district judge would reject a magistrate’s proposed findings on credibility when those findings are dispositive and substitute the judge’s own appraisal.’” (citations omitted) (omission in original)), and having

¹ On 6 April 2015, the court dismissed Grounds 3 and 4. (DE # 104.)

thoroughly reviewed the record in this proceeding, including the transcript of the evidentiary hearing and evidence submitted in connection therewith, the court concludes that petitioner has failed to prove by a preponderance of the evidence that trial counsel acted deficiently. See Jacobs v. United States, 350 F.2d 571, 574 (4th Cir. 1965) (dissent) (“This [28 U.S.C. § 2255 proceeding] being a civil action we begin with the proposition that the burden of proof is upon the petitioner to establish the allegations of his petition by a preponderance of evidence.” (citing Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958))).

The court ADOPTS the Background section and sections IA, IC, ID, II, and III of the Discussion section of the M&R as its own.² Petitioner’s § 2255 motion as to Grounds 1 and 2 is DENIED. The court finds that petitioner has not made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, a certificate of appealability is DENIED.

This 13 October 2016.



W. Earl Britt
Senior U.S. District Judge

² The court does not adopt section IB of the Discussion section, which pertains to the standard of review of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), as the court ruled on the government’s Rule 12(b)(6) motion, in its entirety, on 6 April 2015.